

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

**PENNSYLVANIA**

**SPECIAL EDUCATION HEARING OFFICER**

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DECISION

DUE PROCESS HEARING

Name of Child: A.A.#  
ODR #14846 / 13-14-AS

Date of Birth:  
[redacted]

Dates of Hearing:  
August 26, 2014  
September 11, 2014

CLOSED HEARING

Parties to the Hearing:  
Parent[s]

Representative:  
Daniel Cooper, Esquire  
Law Offices of Kenneth S. Cooper  
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Harambee Institute Charter School  
640 N. 66<sup>th</sup> Street  
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Date Record Closed:

September 26, 2014

Date of Decision:

September 28, 2014

Hearing Officer:

Linda M. Valentini, Psy.D., CHO  
Certified Hearing Official

## Background

Student<sup>1</sup> is an elementary school aged student who has been attending Harambee Charter School [hereinafter the School] since January 2013. Student has just completed second grade there. Student's mother requested this hearing, alleging that the School committed a procedural and substantive violation of Student's rights under the Individuals with Disabilities Education Act [IDEA] by not providing an evaluation in a timely manner subsequent to parent's request, by disciplining Student inappropriately given that Student should have been evaluated and found eligible, and once Student was found eligible for special education, by not providing an appropriate special education program. Student's mother seeks compensatory education for these alleged violations and requests that the compensatory education be designated to be used as private school tuition.

The procedural history of this matter is as follows: The Parent filed her complaint on March 31, 2014 and a hearing date was set within the statutory requirements. Subsequently, just prior to the hearing date the parties informed the hearing officer that the matter had been settled and requested a 60-day conditional dismissal order which was issued on May 10, 2014. Counsel later informed the hearing officer that the anticipated agreement was not able to be finalized and reinstatement was requested. The hearing was rescheduled and held as put forth below.

## Issues

1. Did the School commit a procedural violation of its Childfind obligations resulting in a substantive violation of Student's rights to FAPE under the IDEA by failing to evaluate Student in a timely fashion subsequent to parent's request for an evaluation?
2. During the period of time prior to its finding of eligibility did the School discipline Student inappropriately given that the evaluation ultimately found Student eligible for special education?
3. Once Student was found eligible for special education, did the School fail to provide Student with a free appropriate public education [FAPE] through failure to implement the IEP?
4. If the School committed procedural violations of Student's rights under the IDEA and thus deprived Student of FAPE is Student eligible for compensatory education services and if so in what form and in what amount?

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<sup>1</sup> This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

### Findings of Fact

1. Student moved to [redacted] and enrolled in the School in January 2013 for the latter half of first grade. At the end of the 2013- 2014 academic year Student completed second grade. [NT 28, 32]
2. In the prior public school Student engaged in behaviors that required disciplinary action. [NT 29-31]
3. Student's mother sought assistance for Student through a community behavioral health agency. [NT 31; S 1 through S-19, exclusive of S-3]
4. Student continues to receive behavioral health services from that agency. [NT 32]
5. Student received the diagnoses of Disruptive Behavior Disorder, Mood Disorder, and Attention Deficit Hyperactivity Disorder from the behavioral health agency. [NT 32; P-11]
6. Within a week of Student's entrance into the School Student began displaying inappropriate behaviors such as excessive attention seeking and getting into altercations with other students. [NT 35, 181]
7. On February 4, 2013 Student's mother gave the School's chief academic officer a written request that Student be evaluated to determine whether Student had any learning disabilities.<sup>2</sup> [NT 36; P-1]
8. The School did not issue a Permission to Evaluate and the School did not evaluate Student during the remainder of that school year. [NT 36]
9. In mid-March 2013 the School developed a behavior intervention plan to address Student's problem behaviors which included getting out of Student's seat, excessive hand raising, noncompliance and aggression. The behavior intervention plan was to last for six weeks. [NT 37; S-20, P-3]
10. The behavior intervention plan provided for anger management instruction and stress management by the counselor and social skills training by the art therapist. The behavior intervention plan also included a number of accommodations including clear concise directions; frequent reminders and prompts; teacher staff proximity; reprimanding student privately; reviewing rules and expectations; supervising free time; avoiding strong criticism; having a predictable routine and schedule; preferential seating; specifically defined limits; and friendship support for self-esteem. [P-3]

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<sup>2</sup> The chief academic officer testified that she did not remember receiving this letter. [NT 177-178]

11. Positive consequences for appropriate behavior included verbal praise, earned privileges, immediate feedback, computer time, arts and crafts, positive call or note home, positive visit to Mama [redacted].<sup>3</sup> [P-3]
12. Negative consequences for inappropriate behavior included phone call home, loss of privileges, timeout, work detail, lunch detention, out of school suspension, sending to Baba [redacted], and sending to Mama [redacted]. [P-3]
13. The parent believes that the plan was not working and attributes much of this to staff unwillingness to comply with the requirements of the plan. [NT 37-38]
14. Because the parent missed mandatory group parent meetings the School notified the parent that Student was not welcome to return for the 2013- 2014 school year. [P-4]<sup>4</sup>
15. The parent tried to reschedule meetings as the designated times were not possible for her, and also believed that because she had individual meetings at the School around the behavior intervention plan she was not required to attend the mandatory group parent meetings. [NT 41]
16. In response to the letter, the parent employed legal intervention as well as sending several e-mails herself. The School changed its position and allowed Student to return in September 2013. [NT 43]
17. On the third day of school in September 2013 parent received a phone call from the teacher who noted that Student seemed anxious and was out of seat. Mother communicated that she was willing to speak with staff at any time, and she again requested that Student be evaluated. [NT 44]
18. The School then evaluated Student and issued its evaluation report [ER] on October 10, 2013. The evaluation concluded that the Student did not have a disability and was therefore not eligible for special education. [NT 45; P-5]
19. The School reissued the evaluation report, providing a copy to the parent on October 28, 2013. In the revised report the evaluation concluded that the Student did have a disability and was in need of specially designed instruction and therefore was eligible for special education. Student's primary disability category was emotional disturbance. The parent was in agreement.<sup>5</sup> [NT 46, 51-52; P-6]

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<sup>3</sup> The school references its staff through the use of "Mama" for female staff and "Baba" for male staff.

<sup>4</sup> The form letter is confusing in that it lists four possible reasons why a student would be ineligible to return to the School but indicates the specific student's reason[s] through bold print and asterisks next to one or more of the items. [P-4]

<sup>5</sup> The School argues that it was compelled by mother's threats of legal action to reverse its evaluation findings and to find Student eligible under the classification of emotional disturbance, that it conditioned the eligibility determination and classification upon mother's consenting to a psychiatric evaluation to confirm the classification, and that since the mother reneged on her agreement the ER's determination and the classification are rendered invalid. As discussed below this way of proceeding is impermissible.

20. The School issued a Notice of Recommended Educational Placement [NOREP] on November 6, 2013. The NOREP states that Student “is eligible under ED”. [P-8]
21. The section of the NOREP where the recommended placement should have been listed is blank. [P-8]
22. The Parent approved the NOREP on the day it was issued. [P-8]
23. Student’s IEP was dated November 26, 2013, but an actual IEP meeting was not held until December, “just before the winter break”. [NT 254, 256; P-10]
24. The IEP implementation date was listed as January 6, 2014. [P-10]
25. Student’s IEP provided for Itinerant Emotional Support programming, with the related services of sessions with the guidance counselor for 60 minutes a month and 1:1 assistance for 2.5 hours per week. [NT 52-55; P-10]
26. Pursuant to the IEP a certified special education teacher worked with Student on social skills. During the period the certified special education teacher worked with Student she did not produce progress monitoring, conduct or commission an FBA, nor revise the behavior support plan. [NT 211-213, 264-266]
27. The certified special education teacher who worked with Student following the implementation of the IEP on January 6, 2014 left employment at the School in February 2014<sup>6</sup>. [NT 216-217, 251]
28. When Student’s certified special education teacher left the School the School did not provide Student services through a certified special education teacher. The School’s chief academic officer, a certified regular education teacher, who is responsible for all academic programming in the School took over the responsibilities of the former certified special education teacher. [NT 160, 209-210]
29. When Student’s certified special education teacher left the School services were also provided by two individuals who had been working in conjunction with the certified special education teacher. These individuals were a paraprofessional without a college degree and an individual acting as a “counselor” who had neither a Bachelor’s degree nor certification as a school counselor. [NT 316-317, 334-336]
30. Student continued to display problem behaviors through the remainder of the 2<sup>nd</sup> grade school year. Student’s regular education teacher noted negative behavior

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<sup>6</sup> The exact date is not in evidence. The hearing officer will therefore assign a date midway through the month, that is, her last date of employment will be considered to be February 14, 2014.

both inside and outside the classroom. In the classroom setting, Student's behaviors as listed by the teacher were "bullying verbally, bullying physically, spitting, hitting, kicking, stealing, scratching, tantrums, loud outbursts, hysterical laughing during quiet instructional time, [and] excessive lying." These negative behaviors diminished in intensity from September to June, but were still present at the end of the school year. [NT 298-300]

### Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). In this case the Parent asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). The witnesses generally presented no specific credibility problems, however the parent's testimony and ability to produce a copy of her February 2013 written request for an evaluation outweighed the School's witness's testimony that she did not remember if she received the letter or not.

Charter Schools: The Individuals with Disabilities Education Act (IDEA) requires states to provide a "free appropriate public education" to all students who qualify for special education services. Pennsylvania implements IDEA by way of 22 Pa. Code Chapter 14. However, under the enabling Act 22 of June 12, 1997 Pennsylvania charter schools were to be autonomous "independent public schools" free from certain regulations. Thus Pennsylvania charter schools had an exemption from the special education aspects of 22 Pa. Code Chapter 14 and were simply required to comply with federal law. Accordingly, from June 12, 1997, to June 8, 2001, Pennsylvania charter schools were governed in the area of special education under the federal law. On June 8, 2001, the Charter School Services and Programs for Children with Disabilities Law,<sup>1</sup> was adopted and became

effective on June 9, 2001 to specify how the Commonwealth of Pennsylvania would meet its obligations to ensure that charter schools comply with the IDEA and its implementing regulations.<sup>1</sup> Effective June 9, 2001, 22 Pa. Code §711.1 et seq., along with federal regulations, governs special education in Pennsylvania Charter Schools. *See also, R.B. ex rel. Parent v. Mastery Charter Sch.*, 762 F.Supp.2d 745 (E.D.Pa.2010)

Standards for a Free Appropriate Public Education: Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §711.1 *et seq.* and 34 C.F.R. §300.300, *et seq.* a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA). A FAPE is "an educational instruction specially designed . . . to meet the unique needs of a child with a disability, coupled with any additional 'related services' that are 'required to assist a child with a disability to benefit from [that instruction].'" *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 127 S. Ct. 1994, 167 L. Ed. 2d 904 (2007) (citing 20 U.S.C. § 1401(29)); see also 20 U.S.C. §§ 1401(9), (26)(A). In determining whether an LEA has offered an appropriate program, the proper standard is whether the proposed program is reasonably calculated to confer meaningful educational benefit. *Rowley*. "Meaningful benefit" means that an eligible student's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3<sup>RD</sup> Cir. 1999).

However, under the interpretation of the IDEA statute established by *Rowley* and other relevant cases, an LEA is not required to provide an eligible student with services designed to provide the best possible education to maximize educational benefits or to maximize the child's potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 251; *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3<sup>rd</sup> Cir. 1995). Pennsylvania's Eastern District Court wrote that under the IDEA "schools are held to a minimum baseline standard, a standard that may fail to meet the expectations of the parents of disabled and nondisabled children alike". *Sinan L. et al vs School District of Philadelphia*, 2007 WL 1933021 ([E.D. Pa. 2007]). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

The next inquiry revolves around whether teaching social skills and emotional regulation is within the realm of responsibility of an LEA. Evidence that the courts hold that schools are responsible for teaching social skills and emotional regulation is clear in case law. The Third Circuit articulated its position that education is more than academics and involves emotional and social progress in its holding that an IEP is appropriate if it offers meaningful progress in *all relevant domains under the IDEA* (emphasis added). *M.C. v. Central Regional S. D.*, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996), cert. den. 117 S. Ct. 176 (1996). In *Breanne C. v. Southern York County School District*, 2010 WL 3191851 (M.D. Pa. 2010) the court noted that when an eligible child receives an IEP, that IEP must be reasonably calculated to afford the child the opportunity to receive a "meaningful educational

benefit” [*Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 198 (3d Cir.2004); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir.1999)] and that an IEP confers a meaningful educational benefit when it is more than a trivial attempt at meeting the educational needs of the student, and it is designed to offer the child the opportunity to make progress in all relevant domains under the IDEA, including behavioral, social and emotional.

Further support for the finding that school districts are mandated to attend to behavioral, social and emotional education is found in Pennsylvania statutes. The Pennsylvania Department of Education [PDE], headed by the Secretary of Education, is charged by the General Assembly with developing rules and regulations to carry out its legislative enactments as set forth in the Pennsylvania School Code. Act of July 23, 1969, P.L. 181, § 1, 71 Pa. Stat. Ann. §§ 1037, 1038; Act of June 16, 1994, P.L. 319, No. 49, § 9, 64 Pa. Stat. Ann. § 468. The PDE explains that public education “prepares students for adult life by attending to their intellectual and developmental needs and challenging them to achieve at their highest level possible. In conjunction with families and other community institutions, public education prepares students to become self-directed, life-long learners and responsible, involved citizens.” 22 Pa Code § 4.11(b). Thus, public education in Pennsylvania is intended to provide opportunities for students to: (1) Acquire knowledge and skills. (2) Develop integrity. (3) Process information. (4) Think critically. (5) Work independently. (6) Collaborate with others. [and] (7) Adapt to change. 22 Pa Code § 4.11(c). Finally, attention is invited to 22 Pa Code 4.21(b) related to “Elementary Education: primary and intermediate levels” – which mandates that “curriculum and instruction in the primary program shall focus on introducing young children to formal education, developing an awareness of the self in relation to others and the environment, and developing skills of communication, thinking and learning”.

Compensatory Education: An eligible student to whom an LEA has denied FAPE is entitled to correction of that situation through compensatory education, an equitable “remedy ... designed to require school districts to belatedly pay expenses that [they] should have paid all along.” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3<sup>rd</sup> Cir. 2009) (internal quotation marks and citation omitted).

Compensatory education is given for a period equal to the deprivation and measured from the time that the school district knew or should have known of its failure to provide FAPE. *Mary Courtney T. v. School District of Philadelphia* at 249; *M.C. v. Central Regional School District*, 81 F.3d at 395; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 536 (3d Cir.1995). The school district, however, is permitted a reasonable amount of time to rectify the problem once it is known. *M.C. v. Central Regional School District* at 396.

In contrast to the hour-for-hour approach utilized in Pennsylvania following *M.C.* the standard for arriving at compensatory education set out by the Commonwealth Court of Pennsylvania in *B.C. v. Penn Manor School District*, No. 1150 C.D. 2005, 2006 Pa. Commw. LEXIS 445 (8/15/06), a gifted case, was “where there is a finding that a student is denied a FAPE and ... compensatory education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring [him/her] to the

position that [he/she] would have occupied but for the school district's failure to provide a FAPE." In a recent IDEA case from this Circuit, the standard was affirmed. *See Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3<sup>rd</sup> Cir. 2010), *citing Reid v. District of Columbia*, 401 F3d 516, 518 (D.C. Cir. 2005) (Compensatory education is intended to assure that an eligible child is restored to the position s/he would have occupied had a violation not occurred.)

### Discussion

The testimony of every witness, and the content of each exhibit, was considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit. The parties' written closings were also carefully considered.

#### Scope of the hearing:

In its closing statement the School first argues through counsel that during the due process hearing the parent went beyond the scope of her written complaint. When the hearing officer made her opening remarks she instructed counsel to provide a complete account of all issues to be heard in the hearing. The hearing officer emphasized that all issues to be heard needed to be included in the party's opening statement. After the parties presented their opening statements the hearing officer reiterated the issues on the record detailing the issues that had been stated. The hearing officer then asked each attorney to affirm that the issues to be heard were as the hearing officer had stated. Both the attorney for the parent and the attorney for the School agreed. [NT 25-26] It is disingenuous then for the School to raise an objection to issues addressed during the hearing in its closing argument submitted in writing several weeks subsequent to the date of the hearing. The time for such an objection to be raised and ruled upon was directly at the beginning of the due process hearing session. The School's counsel raised no such objection and by failing to do so failed to preserve that objection either during the course of the hearing or for a subsequent appeal. Accordingly the School's objection to the scope of the hearing is denied and will receive no further consideration.

#### Childfind:

On February 4, 2013 Student's mother requested in writing that Student be evaluated. The School did not issue a Permission to Evaluate [PTE], and delayed its evaluation well beyond the statutory 60 calendar days [excluding summer], not producing its amended evaluation report until October 28, 2013. Given the grace period of a school week to formulate a PTE and have it signed, the evaluation clock is deemed to have started on February 10, 2013, with the 60 days to have been completed on April 11, 2013. As Student was found eligible for special education, discounting the summer months, Student was denied FAPE from April 12, 2013 through October 27, 2013. Although the School provided a behavior intervention plan during most of this period, there was no IEP and Student did not enjoy the protections that eligibility under the IDEA, or under Section 504, confer. The School's irrefutable procedural error resulted in a substantive denial of FAPE to Student; compensatory education services will be discussed below.

**Eligibility:**

The School alleges that it conditioned its finding that Student was eligible under the IDEA with the classification of Emotional Disturbance on the mother's subsequently allowing Student to have a psychiatric evaluation to confirm that Student was emotionally disturbed. Since the mother ultimately did not follow through with Student's psychiatric evaluation, the School now argues that there was a breach of contract and that the finding of eligibility is therefore nullified.

It is the responsibility of the LEA to conduct an appropriate evaluation; if the School believed that it needed a psychiatric evaluation in order to determine Student's eligibility, and could not gain parental consent, it could have filed for a due process hearing to obtain a hearing officer's order for the psychiatric. Alternatively, the School could have found Student eligible using the data it had gleaned without relying on a psychiatric evaluation, an acceptable but not an ideal solution. Finally, the School could have concluded that the data it did have did not support a finding of eligibility under Emotional Disturbance, and possibly that that the data did not support any other category of disability under the IDEA, and thus find Student ineligible for special education. The Childfind obligation is not satisfied by trading quid pro quo with parents. The School's ultimate finding of eligibility under the category of Emotional Disturbance stands unless and until after an appropriately constituted re-evaluation the multidisciplinary evaluation [MDE] team concludes otherwise.

**Discipline:**

The parent asserts that the School's decision not to invite Student back for 2<sup>nd</sup> grade was a violation of Student's rights under the IDEA as a child who should have been thought to be eligible or who was eligible. There is no direct evidence that Student's behavior was behind the School's decision. Although it may be suspected that Student's difficult behaviors as well as the parent's alleged failure to be completely cooperative with the School may have been part of the School's motivation, this point was far from proven. I therefore cannot make a finding that Student was inappropriately disciplined as the evidence only establishes that the parent's failure to attend mandatory group parent meetings was the basis for the decision to dismiss Student.

**IEP:**

The Student's October 28, 2013 evaluation found Student eligible for special education. According to statutory timelines, an IEP meeting must take place within 30 days of the initial eligibility determination, and the IEP must be implemented "as soon as possible"; in Pennsylvania a "reasonable time" for implementation cannot exceed 10 days. [34 C.F.R. 300.323(c); 22 Pa. Code 14.131(a)(6)] The IEP created for Student was dated November 26, 2013 a date within statutory timelines [although the actual initial IEP meeting was not held until December]. Inexplicably the November 26, 2013 IEP carried an implementation date of January 6, 2014 rather than December 6, 2013. Accordingly the School committed a procedural error that resulted in a substantive denial of FAPE

from December 6, 2013 through January 5, 2014. Compensatory education services are due for this period and will be discussed below.

**FAPE:**

Student began receiving special education services under an IEP on January 6, 2014. The certified special education teacher who was primarily responsible for providing these services for a six-week period was well-qualified, and although she did not produce progress monitoring, conduct or commission an FBA or formulate/revise a behavior support plan during that brief period she will not here be faulted for not doing so given the need to become familiar with Student and Student's needs. During this six-week period Student was afforded at least the "basic floor of opportunity" that is the entitlement conferred by the IDEA.

Once the certified special education teacher left the School, Student no longer received services from a certified special education teacher. Although the three individuals responsible for her special education programming from mid-February until the end of the school year undoubtedly provided some benefit to Student, indeed these individuals' testimony conveyed genuine interest and beneficence toward Student, the fact remains that there was not a special education teacher involved in Student's programming. This lack presents an incurable flaw, and thus results in a finding that FAPE was denied from February 15, 2014 through the last day of school in June 2014 and compensatory education is due as discussed below.

Notably the School argues in its closing statement that Student received meaningful educational benefit because Student's grades were good. However, as noted above, education is more than academics and LEAs are responsible for a child's social and behavioral development. Although applicable to all children, this is particularly true when a child is classified as having an emotional disturbance. Additionally Student's academic success does not remove the School's responsibility to adhere to the requirements of the IDEA and Pennsylvania Chapter 14.

**Compensatory education:**

I find that the standard for awarding compensatory education set out by the Commonwealth Court of Pennsylvania in *B.C.* is unworkable in this case. In the instant matter there was no testimony directed toward what would be needed to bring Student to the position student would occupy but for the denial of FAPE and I cannot construe such a calculation. Accordingly I will award compensatory education as set forth below.

Compensatory education is due for the four academic months during which Student would have received special education services had the evaluation been completed within statutory time limits. It is estimated that Student was deprived of forty-five [45] minutes of emotional support programming per day for every day Student attended school from April 12, 2013 to the last day of school in June 2013, and from the first day of school in the 2013-2014 school year through October 27, 2013.

Once Student was evaluated and found eligible the School was then required to have an IEP in place in 30 days and implemented 10 days from the IEP date, in this case implemented on or before December 6, 2013. In fact however, although the initial IEP for Student was dated November 26, 2013 the implementation date was January 6, 2014. Thus Student was deprived of FAPE from December 6, 2013 through January 5, 2014, the period when Student should have begun receiving special education services. Again, forty-five [45] minutes of compensatory education for each day Student was present in school during this period is an appropriate remedy.

Finally and unfortunately Student received special education programming from a certified special education teacher for only six weeks whereupon the certified special education teacher left employment and her position was not filled. During the time the certified special education teacher worked with Student FAPE was provided. Accordingly Student is entitled to compensatory education in the form of forty-five [45] minutes per day for every day Student was present in school from February 15, 2014 to the last day of school in June 2014. Student's official attendance record will determine the exact number of days Student was present in school.

The compensatory education services must be used for therapeutic services directed toward Student's emotional/behavioral/social growth and development, and may include such things as, for example, individual and/or group counseling, participation in programs addressing anger management and emotional regulation, and parent education and training directed towards managing children with emotional disturbance. These services may be used after school, in the evenings, on weekends and during the summer until Student completes sixth grade as these years are crucial for personality development and preparation for the challenges of adolescence. These services may not substitute for or supplant services provided through Student's current or future IEPs. The total cost of the services shall not exceed the cost, including salaries and benefits, of a certified emotional support teacher who should have provided services to Student under an IEP for these periods. The Order below will also permit the parent to use the compensatory education for private school tuition, but under the very specific conditions set forth in the Order.

**Dicta:**

This matter was unusual in that it was the School's succession of procedural failures that resulted in a substantive denial of FAPE. The testimony of the School's witnesses created a very favorable impression of the School's commitment to its students' academic and cultural/civic growth, and its strong emphasis on family involvement is commended. It is hoped that this case will cause the School's staff and directors to look closely at its special education procedures and bring them strictly in line with the requirements of the IDEA and Pennsylvania Chapter 14 so that its fine work is not eroded through inattention to important details. The School's defense, particularly as articulated in its opening and closing arguments, centered largely upon its perception that the parent was working at cross-purposes with the School. This perception was supported in part by encounter notes from the behavioral health agency working with the family [S-1 through S-19, exclusive of S-3]. Had the School not committed the clear procedural violations detailed

above, and had it provided Student with FAPE under the IDEA and Pennsylvania Chapter 14 in compliance with all the mandatory requirements of the IDEA and Pennsylvania Chapter 14, the parent's conduct may have considerably or completely affected the outcome of this matter. This hearing officer sincerely hopes that the parent will help Student to begin to accept greater responsibility for managing inappropriate behavior and that she will offer complete cooperation with school staff working with her child. Student is very young, and it is of great importance that all adults in Student's life are unified in support of Student's behavioral/ emotional/social growth, as failure to do so will likely have negative consequences for Student's educational progress.

#### Order

It is hereby ordered that:

The School committed procedural violations that resulted in a substantive denial of FAPE for the following periods: April 12, 2013 through October 27, 2013; December 6, 2013 through January 5, 2014; February 15, 2014 through the last day of school in June 2014.

Student shall receive forty-five [45] minutes of compensatory education for each day Student was present in school during the periods put forth above. The compensatory education shall be used as discussed above for the time period discussed above and its maximum cost shall be determined as discussed above.

The parent is expressly permitted to use the compensatory education ordered above for tuition to a private school, but should she do so it is further Ordered that such a placement in a private school shall not be deemed an "agreed upon" placement for stay put purposes, and further that the School shall have no obligation to fund tuition over and above that which may be covered by the amount of compensatory education, and further that the School shall have no obligation to provide transportation to the private school. Should the parent decide to enroll Student in a private school, the School will no longer be Student's LEA, as enrollment in a private school will constitute disenrollment from the School, and Student's school district of residence will become Student's LEA.

Within 30 school days of the date of this evaluation Student must receive a psychiatric evaluation for which no parental consent is required. The School shall choose the psychiatrist and ensure that Student receives the evaluation. The evaluation may be conducted in the school to ensure compliance, or school staff may accompany the child and the parent to the evaluation if necessary to ensure compliance. Following the psychiatric evaluation the IEP team shall meet and consider the findings and recommendations of the psychiatric evaluation as they relate to eligibility and programming.

Any claims not specifically addressed by this decision and order are denied and dismissed.

September 28, 2014

*Linda M. Valentini, Psy.D., CHO*

Date

Linda M. Valentini, Psy.D., CHO  
Special Education Hearing Officer  
NAHO Certified Hearing Official